



3410-05-P

DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 12

RIN 0560-AH97

Highly Erodible Land and Wetland Conservation

**AGENCY:** Office of the Secretary and Farm Service Agency, USDA.

**ACTION:** Final Rule.

**SUMMARY:** Existing Department of Agriculture (USDA) regulations specify the conditions that may make a producer ineligible for certain USDA benefits, such as disaster assistance payments from the Farm Service Agency (FSA), in certain cases in which agricultural commodities are planted on highly erodible land or a converted wetland, or the production of agricultural commodities on acreage is made possible by the conversion of a wetland. Those regulations also specify the authorized exemptions, which include an exemption based on a “good faith” determination. The “good faith” provisions in the USDA regulations allow violators of highly erodible land conservation (HELC) or wetland conservation (WC) provisions to retain eligibility for USDA program benefits if certain conditions are met. This rule revises the “good faith” provisions in two ways, first, by requiring higher level concurrence within USDA with the good faith determination and second, by reducing the amount of the benefit to be received in an

amount commensurate with the seriousness of a HELC violation. These changes to the regulations are made to implement provisions specified in the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill).

**EFFECTIVE DATE:** [Insert date of publication in the FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Candace Thompson, Production, Emergencies and Compliance Division, Farm Service Agency, United States Department of Agriculture (USDA); telephone: (202) 720-3463. Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

**SUPPLEMENTARY INFORMATION:**

Background

USDA regulations specifying the conditions that may make a producer ineligible for certain USDA benefits, such as disaster assistance payments from FSA, in certain cases in which agricultural commodities are planted on highly erodible land or a converted wetland, or production of agricultural commodities on acreage is made possible by the conversion of a wetland, are in 7 CFR part 12, “Highly Erodible Land and Wetland Conservation.” The regulations have been in place since the implementation of the requirements in the Food Security Act of 1985 (Pub. L. 99–198, commonly known as the 1985 Farm Bill). The 1985 Farm Bill provides restrictions applicable to participants in certain USDA programs on the use of highly erodible land and wetlands. Participants

are ineligible for certain loans, payments, and benefits for the production of an agricultural commodity on highly erodible land unless the land is farmed according to a conservation system approved by USDA's Natural Resources Conservation Service (NRCS). Participants are similarly ineligible for benefits if they convert a wetland to make possible the production of an agricultural commodity or plant an agricultural commodity on a converted wetland. Under the HELC and WC provisions of the 1985 Farm Bill, persons determined to be in violation of HELC or WC provisions are ineligible for certain loans, payments, and benefits in the year that the violation occurred. Persons who violate HELC or WC provisions remain ineligible for certain loans, payments, and benefits until corrective actions have been implemented on the highly erodible land or the converted wetland has been restored. This rule is not changing these HELC and WC provisions.

The 1985 Farm Bill and the current regulations provide some exemptions to the requirements of the HELC and WC provisions and allow USDA flexibility in helping producers achieve compliance. Eligibility for loans, payments, and benefits may be reinstated if one of the exemptions authorized by the 1985 Farm Bill and implemented in the current regulations applies. One of those exemptions applies to persons who failed to apply a conservation system on highly erodible land, or who converted wetlands or planted an agricultural commodity on a converted wetland but who acted in good faith and without intent to violate HELC or WC provisions. These exemptions are specified in §12.5, "Exemptions."

Prior to the 2008 Farm Bill, the HELC and WC provisions in 16 U.S.C. 3812 and 3822 allow for a good faith exemption to the program ineligibility that would otherwise

apply in the case of a violation. Section 2002 of the 2008 Farm Bill amends the “good faith” provisions by requiring additional review for determinations for both HELC and WC matters and by changing the HELC provisions to provide that in all cases the Secretary can impose a payment reduction commensurate with the seriousness of the violation. Under prior law in some cases the Secretary was required to automatically fully allow program benefits. With respect to review, the 2008 Farm Bill specifies that local HELC and WC good faith determinations must be reviewed within the agency. Specifically, under the new process, the good faith determinations made by a local FSA county committee must be reviewed at the FSA State or district level, with the technical concurrence of the NRCS State or area level conservationist, before benefits are restored.

These new provisions have been implemented administratively to be in compliance with the 2008 Farm Bill requirements, and this rule changes the regulations accordingly.

In addition to making these changes, this rule revises several paragraphs in the regulation to simplify the structure and to clarify the language, without changing the substantive provisions. Additionally, this rule makes a minor, technical change by adding the word “acreage” in the paragraphs on wetland mitigation, so that the rule will now require that wetland values, acreage, and functions are adequately mitigated.

(NOTE: The remaining uses of the term “functions and values” in 7 CFR part 12 are correct and do not need to be changed.) That change is made to be consistent with section 1222(f)(2) of the 1985 Farm Bill, (16 U.S.C. 3822(f)). The change is being made in the following paragraphs:

- Section 12.1(b)(4),

- Section 12.4(c),
- Section 12.5(b)(1)(iii)(D), (b)(1)(vi)(A), (b)(1)(vi)(B), and (b)(4)(i), (b)(4)(i)(E), (b)(4)(i)(F), (b)(4)(ii), and (b)(4)(iii),
- Section 12.31(d) (in the final sentence only), and
- Section 12.33(a).

#### Notice and Comment

These regulations are exempt from the notice and comment requirements of the Administrative Procedures Act (5 U.S.C. 553) as specified in section 2904 of the 2008 Farm Bill, which requires that the regulations be promulgated and administered without regard to the Statement of Policy of the Secretary of Agriculture effective July 24, 1971 (36 FR 13804), relating to notices of proposed rulemaking and public participation in rulemaking.

#### Executive Orders 12866 and 13563

Executive Order 12866, “Regulatory Planning and Review,” and Executive Order 13563, “Improving Regulation and Regulatory Review,” direct agencies to assess all costs and benefits of available regulatory alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Office of Management and Budget (OMB) designated this rule as not

significant according to Executive Order 12866, and, therefore, this rule has not been reviewed by OMB.

#### Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is not applicable to this rule because the Secretary of Agriculture, FSA, and CCC are not required to publish a notice of proposed rulemaking for this rule.

#### Environmental Review

The environmental impacts of this rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321-4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500-1508), and FSA regulations for compliance with NEPA (7 CFR part 799). The specific changes required by the 2008 Farm Bill that are identified in this rule are considered administrative in nature, solely amending those provisions in the USDA regulations dealing with HELC and WC violators and the retention of USDA program benefits. Therefore, FSA has determined that NEPA does not apply to this final rule, and no environmental assessment or environmental impact statement will be prepared.

#### Executive Order 12372

This program is not subject to Executive Order 12372, which requires consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published in the Federal Register on June 24, 1983 (48 FR 29115).

#### Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not retroactive and does not preempt State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. Before any judicial action may be brought regarding the provisions of this rule, appeal provisions of 7 CFR parts 11 and 780 must be exhausted.

#### Executive Order 13132

The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule does not impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

#### Executive Order 13175

This rule has been reviewed for compliance with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” The Executive Order imposes requirements on the development of regulatory policies that have Tribal implications or preempt Tribal laws. The policies contained in this rule do not preempt Tribal law. This rule was included in the October through December, 2010, Joint Regional Consultation Strategy facilitated by USDA that consolidated consultation efforts of 70 rules from the 2008 Farm Bill. USDA sent senior level agency staff to

seven regional locations and consulted with Tribal leadership in each region on the rules. When the consultation process is complete, USDA will analyze the feedback and then incorporate any required changes into the regulations.

#### Unfunded Mandates

This rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104-4). In addition, the Secretary of Agriculture is not required to publish a notice of proposed rulemaking for this rule. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

#### Federal Assistance Programs

This rule has a potential impact on participants in most programs listed in the Catalog of Federal Domestic Assistance in the Agency Program Index under the Department of Agriculture.

#### Paperwork Reduction Act

The regulations in this rule are exempt from the requirements of the Paperwork Reduction Act (44 U.S.C. Chapter 35), as specified in section 2904 of the 2008 Farm Bill, which provides that these regulations be promulgated and the programs administered without regard to the Paperwork Reduction Act.

#### E-Government Act Compliance



FSA is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

#### List of Subjects in 7 CFR Part 12

Administrative practice and procedure, Loan programs – Agriculture, Price support programs, Reporting and recordkeeping requirements, Soil conservation.

For the reasons explained above, 7 CFR part 12 is amended as follows:

#### PART 12 – HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION

1. The authority citation for 7 CFR part 12 is revised to read as follows:

Authority: 16 U.S.C. 3801, 3812, and 3822(h).

#### §12.3 [Amended]

2. Amend §12.3, in paragraph (a), by removing the words “Virgin Island” and adding, in their place, the words “Virgin Islands.”

#### §12.4 [Amended]

3. Amend §12.4, in paragraph (d)(2), by removing the words “or highly erodible land” and adding, in their place, the words “on highly erodible land.”

4. Amend §12.5 as follows:

- a. Revise paragraph (a)(5) to read as set forth below,
- b. Add paragraph (a)(7) to read as set forth below,
- c. Revise paragraph (b)(5)(i) to read as set forth below.

§12.5 Exemption.

(a) \* \* \*

(5) Good faith. (i) No person will become ineligible under §12.4 as a result of the failure of such person to apply a conservation system on highly erodible land if all of the following apply:

(A) FSA determines such person has acted in good faith and without the intent to violate the provisions of this part;

(B) NRCS determines that the person complies with paragraph (a)(5)(ii) of this section; and

(C) The good faith determination of the FSA county or State committee has been reviewed and approved by the applicable State Executive Director, with the technical concurrence of the State Conservationist; or district director, with the technical concurrence of the area conservationist.

(ii) A person who otherwise meets the requirements of paragraphs (a)(5)(i)(A) and (a)(5)(i)(C) of this section will be allowed a reasonable period of time, as determined by NRCS, but not to exceed one year, during which to implement the measures and practices necessary to be considered actively applying the person's conservation plan, as determined by USDA. If a person does not take the required corrective actions, the person may be determined to be ineligible for the crop year during which such actions were to be taken, as well as any subsequent crop year.

(iii) Notwithstanding the good-faith requirements of paragraph (a)(5)(i) of this section, if NRCS observes a possible compliance deficiency while providing on-site technical assistance, NRCS will provide to the responsible person, not later than 45 days

after observing the possible violation, information regarding actions needed to comply with the plan and this subtitle. NRCS will provide this information in lieu of reporting the observation as a violation, if the responsible person attempts to correct the deficiencies as soon as practicable, as determined by NRCS, after receiving the information, but not later than one year after receiving the information. If a person does not take the required corrective actions, the person may be determined to be ineligible for the crop year during which the compliance deficiencies occurred, as well as any subsequent crop year.

(iv) A person who meets the requirements of paragraphs (a)(5)(i) and (a)(5)(ii) of this section will, in lieu of the loss of all benefits specified under §12.4(d) and (e) for such crop year, be subject to a reduction in benefits by an amount commensurate with the seriousness of the violation, as determined by FSA. The dollar amount of the reduction will be determined by FSA and may be based on the number of acres and the degree of erosion hazard for the area in violation, as determined by NRCS, or upon such other factors as FSA determines appropriate.

(v) Any person whose benefits are reduced in a crop year under paragraph (a)(5) of this section may be eligible for all of the benefits specified under §12.4(d) and (e) for any subsequent crop year if, prior to the beginning of the subsequent crop year, NRCS determines that such person is actively applying a conservation plan according to the schedule specified in the plan on all highly erodible land planted to an agricultural commodity or designated as conservation use.

\* \* \* \* \*

(7) Technical and minor violations. Notwithstanding any other provisions of this

part, a reduction in benefits in an amount commensurate with the seriousness of the violation, as determined by FSA, and consistent with paragraph (a)(5)(iv) of this section, will be applied if NRCS determines that a violation involving highly erodible land that would otherwise lead to a loss of benefits is both of the following:

(i) Technical and minor in nature; and

(ii) Has a minimal effect on the erosion control purposes of the conservation plan applicable to the land on which the violation occurred.

(b) \* \* \*

(5) Good faith violations. (i) A person who is determined under §12.4 of this part to be ineligible for benefits as the result of the production of an agricultural commodity on a wetland converted after December 23, 1985, or as the result of the conversion of a wetland after November 28, 1990, may regain eligibility for benefits if all of the following apply:

(A) FSA determines that such person acted in good faith and without the intent to violate the wetland provisions of this part; and

(B) NRCS determines that the person is implementing all practices in a mitigation plan within an agreed-to period, not to exceed one year; and

(C) The good faith determination of the FSA county or State committee has been reviewed and approved by the applicable State Executive Director, with the technical concurrence of the State Conservationist; or district director, with the technical concurrence of the area conservationist.

\* \* \* \* \*

5. In addition to the amendments set forth above, in the following places in part

12 remove the words “functions and values” and add in their place the words “values, acreage, and functions”:

- a. §12.1(b)(4),
- b. §12.4(c) each time it appears,
- c. §12.5(b)(1)(iii)(D), (b)(1)(vi)(A), (b)(1)(vi)(B), and (b)(4)(i) introductory text, (b)(4)(i)(E), (b)(4)(i)(F), (b)(4)(ii), and(b)(4)(iii).
- d. §12.31(d) in the final sentence only, and
- e. §12.33(a),

**DATED: December 16, 2011**

Thomas J. Vilsack  
Secretary

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